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## MDPS in Montana: It's the End of the World as We Know It . . . and I Feel Fine

Taodd A. Hume

*Student, University of Montana School of Law*

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# COMMENT

## MDPS IN MONTANA: IT'S THE END OF THE WORLD AS WE KNOW IT . . . AND I FEEL FINE<sup>1</sup>

Taodd A. Hume\*

### I. INTRODUCTION

In the past 20 years revenues of the legal profession in the United States have grown at an astonishing rate: from \$21 billion in 1979 to \$125 billion in 1999.<sup>2</sup> Although it may be an uncouth suggestion, make no mistake about it, providing legal services is big business. And as the legal “business” continues to grow, other forces are at work on the practice of law. Consumers question the cost of legal services, deciding whether to hire a lawyer, act *pro se*, or find other alternatives. Corporations continue to bring more work in-house. Insurance companies place more limits on fees and costs for defense lawyers. And nonlawyers increasingly seek entry into the practice of law.

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1. REM, *It's The End of the World as We Know It (and I Feel Fine)*, on DOCUMENT (Capital Records 1987).

\* B.A. Whitworth College, 1994; expected J.D. University of Montana, 2002. I would like to thank Julie Johnson for her editorial insights and sense of humor regarding earlier drafts of this article.

2. U.S. Dept. of Commerce, Bureau of Economic Analysis, Regional GNP Data, available at <http://www.bea.doc.gov/bea/regional/gsp/> (last visited May 2, 2002). The legal industry in Montana has also grown at a staggering rate over that same time period, from \$54 million in 1979 to \$192 million in 1999. *Id.*

This trend includes the hiring of lawyers by other professional services firms, such as accounting firms,<sup>3</sup> to create a "multidisciplinary practice" (MDP).<sup>4</sup> The desirability of the MDP format is that it enables lawyers and non-lawyers to share fees and profits in a professional entity that provides both legal and non-legal services under one roof.<sup>5</sup> This arrangement in turn allows the MDP firm to cut costs and market itself in a more efficient manner. However, current restrictions recognized by the legal profession prohibit lawyers from sharing fees with non-lawyers in most types of professional partnerships.<sup>6</sup> Lawyers working in professional services firms are providing services that if provided by a lawyer in a traditional law firm setting, would be considered the practice of law. These lawyers claim that they are not practicing law, but rather are providing "consulting" services for their clients. Professional services firms employing these "consulting" lawyers are the subject of growing concerns for bar regulators everywhere.

Virtually every state bar association across the country is

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3. In the United States, Big Five accounting firms employ thousands of lawyers practicing in the areas of tax, corporate, securities, employment, employee benefits and other business-related areas. In 1999, a leading journal reported that excluding tax lawyers, 6,362 lawyers worked for Big Five accounting firms (PricewaterhouseCoopers/Landwell, Arthur Anderson, KPMG, Ernst & Young and Deloitte & Touche). This journal integrated the statistics of the Big Five firms with the statistics from traditional law firms; as a result the listing of the ten largest law firms worldwide included three of the Big Five (showing PricewaterhouseCoopers ranked in third place, Andersen ranked in fourth place and KPMG ranked in the seventh position). Four of the Big Five ranked within the largest twenty law firms (indicating Ernst & Young, in addition to the list of firms cited above). See IFLR1000 50 Largest Law Firms in the World available at <http://www.lawmoney.com/homepage/news/data/top50.asp> (last visited Jan. 20, 2002).

4. During the past 10 years the MDP movement has spread rapidly throughout the world, with Big Five accounting firms providing legal services. In 1996, Arthur Andersen acquired J&A Garrigues, one of Spain's leading law firms. Additionally, accounting firms such as Arthur Andersen and Price Waterhouse have merged with law firms throughout the British Isles, including the acquisition of Scotland's largest firm, Dundas & Wilson. Big Five firms are major providers of legal services in Russia, Eastern Europe, Australia, Hong Kong, Singapore, Canada and a number of Latin American and African countries. See Ward Bower, *The Case for MDPs: Should Multidisciplinary Practices Be Banned or Embraced?*, LAW PRACTICE MANAGEMENT MAGAZINE, Jul/Aug 1999, available at <http://www.abanet.org/lpm/magazine/mdp-bowe995.html>.

5. See Geoffrey C. Hazard, Jr., *Foreword: The Future of the Profession*, 84 MINN. L. REV. 1083, 1084 (2000).

6. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983). I say "most types" of partnerships because Rule 5.4 does list three exceptions to the rule. These exceptions permit payment to a lawyer's estate, sale of a law practice, and participation of nonlawyer employees in a compensation or retirement plan based on profit sharing. *Id.*

currently studying the issue of Multidisciplinary Practices.<sup>7</sup> The question being asked is whether changes in society require changes in the Model Rules of Professional Conduct that would accommodate the MDP format. And specifically, whether Rule 5.4, which currently prohibits lawyers from sharing fees with non-lawyers, should be amended.

Proponents of MDPs do not like the barriers of a traditional law practice, arguing that if the legal profession is not able to approach client needs in a packaged manner, the clients simply will obtain it from other sources.<sup>8</sup> The proponents say MDPs are necessitated by rapid technological advances, the globalization of capital and financial markets, and greater regulation of commercial activity in this country and throughout the world.<sup>9</sup> Proponents see the push for MDPs as having gained unstoppable momentum, and they seek to harmonize the legal profession into the new economy while preserving its existing ethical framework.<sup>10</sup> Finally, supporters of the MDP format suggest that ethical restrictions prohibiting a multidisciplinary practice are relics of the early twentieth century, irrelevant to today's economic reality, and ripe for change.<sup>11</sup>

On the other side, opponents claim that the MDP phenomenon poses a legitimate threat to the core values of the legal profession, namely loyalty, confidentiality and independence. First, opponents fear that MDPs would destroy the professional independence of attorneys, the responsibility to make decisions in the best interest of the client, unconstrained by any other interest.<sup>12</sup> Second, opponents suggest that there is no comparable duty of confidentiality in other professions, and any partnership with nonlawyers could breakdown the

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7. For a current list of state bar associations and their respective positions on the issue of multidisciplinary practice see [http://www.abanet.org/cpr/mdp-state\\_action.html](http://www.abanet.org/cpr/mdp-state_action.html) (last visited May 2, 2002).

8. Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1531 (2000).

9. *Id.*

10. *Id.*

11. *Id.* at 1532. Some proponents also cite the existence of MDPs in European countries. Any lengthy discussion of this topic is outside of the scope of this comment. However, the New York State Bar conducted a survey of MDPs in selected jurisdictions abroad. The survey concluded that any evaluation of the MDP experience in other countries must take into account the differences (i.e. ethical rules and "core values") between the legal profession in the United States and elsewhere. See New York State Bar Report, 185 available at [http://www.abanet.org/cpr/mdp-state\\_action.html](http://www.abanet.org/cpr/mdp-state_action.html) (last visited May 2, 2002).

12. Stein, *supra* note 8, at 1532.

relationship of trust that must exist between lawyers and clients.<sup>13</sup> And finally, opponents argue that the duty of loyalty cannot be discharged adequately if an attorney is an employee of a firm controlled by nonlawyers, who are not required to abide by the same rules regarding conflict of interest as the legal profession.<sup>14</sup> Ultimately, these critics fear the erosion of ethical standards necessary for the just and efficient practice of law.

This comment addresses the question of whether the Montana Bar Association should vote to amend Rule 5.4 of the Montana Rules of Professional Conduct to allow fee-sharing arrangements necessitated by the multidisciplinary model. Section II will discuss how the MDP proposal developed in the United States. Section III will explore different practice forms that an MDP could be modeled after. Section IV discusses the two major structural challenges to adopting MDPs: the prohibition on fee sharing found under Rule 5.4 of the Model Rules of Professional Conduct (including the tangential issues of confidentiality and conflict of interest), and unauthorized practice of law legislation. Section V provides analysis of Montana's options for addressing the MDP issue. And Section VI concludes by suggesting that the only viable option for Montana is to draft and promulgate regulations for this emerging practice form.

## II. DEVELOPMENT OF THE MDP PROPOSAL

In August 1998, then president of the American Bar Association, Philip S. Anderson, appointed a twelve-person Commission on Multidisciplinary Practice (ABA Commission) to examine the MDP phenomenon.<sup>15</sup> After several hearings held

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13. *Id.* at 1533.

14. *Id.*

15. The Commission includes prominent lawyers, judges and academics to represent a variety of backgrounds. The twelve members of the Commission are: Carl Bradford, a state court judge in Portland, Maine; Paul Friedman, a U.S. District Court judge in Washington, D.C.; Phoebe Haddon, a law professor at Temple Law School; Geoffrey Hazard, a law professor at Pennsylvania Law School and former Executive Director of the American Law Institute; Roberta Katz, CEO of the Technology Network; Caroline Lamm, a lawyer at the law firm of Dorsey & Whitney; Burnele Powell, Dean of the University of Missouri-Kansas City Law School; Michael Traynor, a lawyer with Cooley Godward in San Francisco; Herbert Wander, a lawyer with Katten Muchen & Zavis in Chicago; and two ABA Board of Governors Liaisons: Joanne Garvey, a lawyer with Heller Ehrman White & McAuliffe in San Francisco; and Seth Rosner, of counsel to Jacobs, Persinger & Parker in New York. See Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, Background Paper on Multidisciplinary Practice: Issues and Developments (1999) available at <http://www.abanet.org/cpr.multicomreprot0119.html>

around the country, the Commission issued its Report in July of 1999 concluding that MDPs should be permitted, subject to certain restrictions.<sup>16</sup> In defense of its recommendation, the Commission reasoned that since this phenomenon was already occurring, state bar associations should embark upon an approach of regulation rather than prohibition.<sup>17</sup> Subsequent to its release, the Report was directed to the House of Delegates<sup>18</sup> at the ABA's annual meeting in August, 1999. However, by the end of the meeting the House had voted 2-1 in favor of a resolution that recognized the need for further study regarding the potential impact of MDPs on the profession's "core values."<sup>19</sup> Adoption of MDPs seemed to be on hold for the time being.

The next official action came in March 2000, when the Commission, after reviewing comments about its original recommendation, issued a revised proposal.<sup>20</sup> The new proposal reflected a more cautious approach by permitting MDPs only where lawyers retain sufficient control and authority to assure professional independence, and where lawyers are only engaged with "members of recognized professions or other disciplines that are governed by ethical standards."<sup>21</sup> As of the writing of this comment, the ABA is still collecting feedback from its recommendations and waiting further study and suggestion

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(last visited May 2, 2002).

16. See generally Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, Report (1999), available at <http://www.abanet.org/cpr/mdpreport.html> (last visited May 2, 2002) [hereinafter MDP Commission Report]. In pertinent part, the Commission recommended that the legal profession should: (1) maintain rules that protect its "core values" (independence of professional judgment, confidentiality and loyalty); (2) permitted lawyers and nonlawyers to share legal fees, subject to certain safeguards; and (3) permit a lawyer to deliver legal services through a multidisciplinary practice, defined as: a partnership, professional corporation or other association or entity that includes lawyers and nonlawyers and has, as one but not all of its purposes, the delivery of legal services to a client other than the MDP itself. See Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, Recommendations 1-3 (1999), available at <http://www.abanet.org/cpr/mdprecommendation.html> (last visited May 2, 2002) [hereinafter MDP Commission Recommendations].

17. See MDP Commission Report, *supra* note 16.

18. The House of Delegates is the policy-making body of the ABA, which has 530 delegates representing states, counties, ABA sections, and other affiliated organizations. A. B. A. CONSTITUTION AND BYLAWS, RULES OF PROCEDURE HOUSE OF DELEGATES, Art. 6 (1999-2000); AMERICAN BAR ASS'N, POLICY AND PROCEDURE HANDBOOK 1 (1998-99).

19. Florida Bar Recommendation Before the House of Delegates, at the Am. Bar Ass'n Annual Meeting in Atlanta (Aug. 10, 1999), at <http://www.abanet.org/cpr/flbarrec.html>.

20. Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, Draft Recommendation (Mar. 2000), available at <http://www.abanet.org/cpr/marchrec.html>.

21. *Id.* at Principle 1.

from state bar committees around the country.

Virtually every state bar association has at least appointed a committee to study and prepare recommendations regarding the MDP issue. The reaction of these bar committees spans the spectrum, ranging from New York's outright refusal to the District of Columbia's virtual acceptance.<sup>22</sup> In Montana, the Montana Bar Association has appointed a committee to study the issue of multidisciplinary practices.<sup>23</sup> This committee has neither adopted a position nor promulgated any recommendations regarding the MDP issue.<sup>24</sup> To date there has been little public discussion about the MDP format and its potential impacts upon the practice of law in Montana.<sup>25</sup>

### III. FORM AND FUNCTION OF THE MDP MODEL

So what exactly is an MDP, and how would it function? According to the ABA Commission, an MDP is one that includes lawyers and other professionals in a single entity, providing a range of services, including legal services, so that a client can get all of its needs met under a single roof.<sup>26</sup> Examples of MDPs

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22. See Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, Status of Multidisciplinary Practice Studies By State, available at [http://www.abanet.org/cpr/mdp-state\\_action.html](http://www.abanet.org/cpr/mdp-state_action.html) (last visited May 2, 2002).

23. The Montana Committee on Multidisciplinary Practice consists of 9 members: 4 lawyers, 4 nonlawyers, and a chairperson, with each position lasting for a term of three years.

24. In Montana, both entry into the legal profession and the conduct of lawyers once admitted, are regulated by the Montana Supreme Court. MONT CONST. art. VII, § 2(3). Therefore, it is the Supreme Court who will ultimately be responsible to adopt any suggested modifications promulgated by the Montana Bar Association regarding the Montana Rules of Professional Conduct.

25. The first major step in this process was to be a Continuing Legal Education (CLE) seminar regarding multidisciplinary practices, which was to be held at Big Sky, Montana, in July of 2000. This CLE was eventually cancelled due to lack of interest. However, it should be noted that the Montana Bar Association Ethics Committee issued an advisory opinion that forbids multidisciplinary practices under the current version of Montana Rules of Professional Conduct Rule 5.4. State Bar of Mont. Ethics Comm., Advisory Op. 00011 (2000).

26. MDP Commission Report, *supra* note 16. The Commission defined an MDP more precisely as:

a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. . . . It also includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement. Whether a sustained - as opposed to sporadic or casual - relationship between a lawyer and a nonlawyer for the delivery of legal and

might include the following:

accounting firms hiring lawyers and providing legal services; lawyers and chiropractors working together on behalf of persons injured in traffic accidents; environmental consulting firms that handle the entire range of environmental issues for a client, including legal services; real estate development firms that construct, manage and lease the completed structure, having accountants, lawyers and other professionals on staff to provide services in their respective fields; elder assistance firms that hire accountants, social workers, lawyers and other professionals to provide appropriate services; and financial planning firms that hire securities dealers, lawyers, CPAs and financial planners to provide estate and trust planning services.<sup>27</sup>

The ABA has developed a set of possible structural models that the MDP form could take.<sup>28</sup> Those models include:

Model 1: The Cooperative Model<sup>29</sup> This model appeals to the “leave it alone” crowd by maintaining the status quo. In this model there would be no changes to Rule 5.4. Lawyers would be free to employ nonlawyer professionals on their staffs to assist them in advising clients. Lawyers could work with nonlawyer professionals whom they directly retain or who are retained by the client. However, any lawyer having supervisory control over a nonlawyer would have to take steps “to ensure that the person’s conduct is compatible with the professional obligations of the lawyer,” especially in the area of confidentiality.<sup>30</sup>

Model 2: The Command and Control Model This model, based on the amended version of Rule 5.4 adopted by the District of Columbia, would permit a lawyer to form a partnership with a nonlawyer and to share legal fees, subject to certain restrictions. For example, such a law firm must have as its sole purpose the provision of legal services to others; the nonlawyer must agree to abide by the Rules of Professional Conduct; the lawyers with a financial interest or managerial authority are responsible for the nonlawyer participants; and

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nonlegal services to a client may be considered an MDP will depend upon the totality of the relevant facts and circumstances.

*Id.*

27. Wash. State Bar Ass’n, *Future of the Legal Profession*, Report to the Board of Governors (July 2001) available at <http://www.wsba.org/2001/future/default.htm> (last visited May 2, 2002) [hereinafter Report to the Board of Governors].

28. These models were taken from: Comm’n on Multidisciplinary Practice, Am. Bar Ass’n, Hypotheticals and Models, available at <http://www.abanet.org/cpr/multicomhypos.html> (last visited May 2, 2002).

29. This model reflects the status quo throughout the United States with the sole exception of the District of Columbia.

30. See MODEL RULES OF PROF’L CONDUCT R. 5.3 (1983).



these conditions must be set forth in writing.

**Model 3: The Ancillary Business Model** Under this model a law firm would operate an ancillary business that provides professional services to clients. Here, the ancillary business must conform its conduct to Rule 5.7,<sup>31</sup> and must ensure that its clients understand that the ancillary business is distinctly separate from the law firm and does not offer legal services. Lawyers provide “consulting services,” not legal services, to the clients of the ancillary business. In this model, lawyers and nonlawyers are partners in the ancillary business, sharing fees, sharing some clients, and jointly making management decisions together.

**Model 4: The Contract Model** Under this model, a law firm would remain independently controlled and managed by lawyers, but would be free to contract for services with a professional services firm. A contract could include items such as: (1) the law firm agreeing to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising; (2) the law firm and the professional services firm agreeing to refer clients to each other on a nonexclusive basis; and (3) the law firm agreeing to purchase goods and services from the professional services firm such as staff management, communications technology, and rent for the leasing of office space and equipment.

**Model 5: The Fully Integrated Model** In this model, there is a single professional services firm with organizational units, such as accounting, business consulting, and legal services. The legal services unit may represent clients who either retain its services but not those of any other unit of the firm or retain its

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31. Rule 5.7 provides that:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

MODEL RULES OF PROF'L CONDUCT R. 5.7 (1983).

services as well as the services of other units in the firm. In the later case, the legal and nonlegal services may be provided in connection with the same matter or different matters.

Proponents of a multidisciplinary partnership argue that the efficiencies in “one-stop shopping” make Model 5 the preferred model for multidisciplinary practice.<sup>32</sup> On the other hand, opponents claim “the risk of disclosing confidential client information, the danger of conflicts of interest, and the threat of the loss of a lawyer’s independent professional judgment are too great,” in the “Fully Integrated Model.”<sup>33</sup> While opponents are enthusiastic supporters of Model 1, both sides express varying degrees of acceptance and reservation regarding Models 2 through 4.<sup>34</sup>

#### IV. STRUCTURAL RESTRICTIONS TO THE MULTIDISCIPLINARY PRACTICE

Currently, two barriers prevent the practice of law in a multidisciplinary setting: Rule 5.4 and Rule 5.5 of the Model Rules of Professional Conduct. First, Rule 5.4 strictly prohibits fee sharing for fear that such an arrangement will have an adverse effect on a lawyer’s independent professional judgment.<sup>35</sup> Additionally, any modification to Rule 5.4 may also have tangential impacts on client confidentiality (Rule 1.6) and conflicts of interest (Rule 1.7). Also implicated is Rule 5.5 and its accompanying code sections, which forbid the unauthorized practice of law.<sup>36</sup> A look at each of these barriers, along with their historical developments, is necessary to understanding the present context of the MDP debate in Montana.

##### *A. The Prohibitions of Rule 5.4*

Should Montana decide to amend its current rules to permit the MDP format, bar regulators will probably need to review all of the Montana Rules of Professional Conduct to see how they apply in the MDP context.<sup>37</sup> However, at the core of the MDP

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32. Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services From Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 226 (2000).

33. *Id.*

34. *Id.*

35. MODEL RULES OF PROF’L CONDUCT R. 5.4 (1983).

36. *Id.* R. 5.5 (1983).

37. Appendix A to the Commission’s June 1999 Report contains possible

debate is the concern over a lawyer's exercise of independent professional judgment, found in Rule 5.4.<sup>38</sup> A lawyer's professional independent judgment has always been strongly guarded, with the underlying rationale being that splitting fees with a nonlawyer could result in "control by a layperson, interested in his own profit, rather than the client's fate."<sup>39</sup>

It is interesting to note that the original Canons of Professional Ethics, adopted by the ABA in 1908, barred neither fee sharing or partnerships with nonlawyers.<sup>40</sup> These prohibitions entered the rules with the adoption of Canons 33 through 35 in 1928.<sup>41</sup> When the ABA adopted the Code of

amendments to the Model Rules of Professional Conduct in the event MDPs are permitted. See Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, Final Report - Appendix A, available at <http://www.abanet.org/cpr/mdpappendixa.html> (last visited May 2, 2002).

38. The full text of Rule 5.4 currently states:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons; and

(2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) a lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983).

39. *Emmons, Williams, Mires & Leech v. State Bar*, 86 Cal. Rptr. 367, 372 (Ct. App. 3rd Dist. 1970). See also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1519 (1986); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-355 (1987); State Bar of Mont. Ethics Comm., Op. 950411 (1995).

40. Daly, *supra* note 32, at 210.

41. *Id.*

Professional Responsibility in 1969, Canons 33 through 35 remained unchanged.<sup>42</sup> The ABA claimed that these prohibitions were necessary to ensure a lawyer's competence, preserve independent profession judgment, and provide a regulatory scheme that protected the public.<sup>43</sup>

However, the 1969 Model Code soon came under widespread criticism. In 1977, the ABA appointed the "Kutak Commission," named after its chairman Robert J. Kutak, to consider modifying the Model Code.<sup>44</sup> The Kutak Commission presented a Discussion Draft to the ABA's House of Delegates in January 1980 and a Proposed Final Draft in May 1981.<sup>45</sup> This time the proposed draft of Rule 5.4 actually contained language that would have permitted fee sharing arrangements, provided there was no interference with a lawyer's independent professional judgment.<sup>46</sup> This was a radical departure from previous Model Code provisions.<sup>47</sup> So radical, in fact, that the ABA Section of General Practice recommended an amendment which resulted in the deletion of the new language entirely, restoring the traditional prohibitions.<sup>48</sup> Following considerable debate and another round of revisions, the Model Rules of Professional

42. *Id.* at 241.

43. *Id.* at 242.

44. James W. Jones & Bayless Manning, *Getting At the Root of Core Values: A "Radical Proposal to Extend the Model Rules to Changing Forms of Legal Practice"*, 84 MINN. L. REV., 1159,1193 (2000).

45. *Id.*

46. THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT, 236 (1987) [hereinafter Legislative History]. The Kutak Commission recognized that this type of practice arrangement could have implications on a lawyer's independent professional judgment. However, the Commission reasoned that other rules already adequately addressed this problem. For example, Rule 1.7 on conflicts of interest requires complete loyalty to the client's interests, Rule 1.8(f) deals with situations in which the lawyer is paid by a third party for his services, and Rule 1.2(a) confirms that the client alone has final say as to the objectives of the representation. *See* Jones & Manning, *supra* note 44, at 1159.

47. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-103(A) and DR 5-107(B),(C)(1981).

48. *See* Legislative History, *supra* note 46, at 237. Proponents of that amendment argued that the draft proposal represented a dangerous departure from existing law that was neither constitutionally mandated nor warranted by the circumstances; and that "nonlawyers, motivated by a desire for profit, would be unable to appreciate the ethical considerations involved in representing a client, and further would not be subject to any regulation or control." *Id.* The opponents of the amendment claimed that the proposed rule was constitutionally sound, and that the involvement of a nonlawyer did not presumptively interfere with a lawyers professional judgment. In their view, the effect of the amendment "would be to limit the possibilities for formation of capital to sustain the delivery of legal services." *Id.*

Conduct were officially adopted by the ABA in 1983.<sup>49</sup> For purposes of this comment the Montana Rules are essentially the same as the Model Rules.<sup>50</sup>

Currently, Rule 5.4 prohibits lawyers from sharing fees for services with nonlawyers and prohibits a partnership with nonlawyers where the activities of the partnership consist of the practice of law.<sup>51</sup> Rule 5.4 also prohibits a lawyer from practicing law in an organization authorized to practice law for profit if a nonlawyer owns an interest, is a corporate officer, or has the right to direct the lawyer's professional judgment.<sup>52</sup> In short, the current language of Rule 5.4 forbids the MDP format.

However, this could all change if Montana were to adopt the recommendations promulgated by the ABA Commission. The Commission has concluded that it is "consistent with the public interest to permit lawyers to practice in MDPs provided that there are adequate safeguards<sup>53</sup> in place to protect professional independence of judgment."<sup>54</sup>

49. Unlike the early versions of these rules found in the 1928 Canons, the prohibitions found in the Model Rules were binding upon members of the bar. Comm'n on Multidisciplinary Practice, Am. Bar Ass'n, Reporter's Notes: (1999), at <http://www.abanet.org/cpr/mdpappendixc.html> (last visited May 2, 2002) [hereinafter Reporter's Notes].

50. Responding to a petition by the Montana State Bar Association, the Montana Supreme Court adopted the Model Rules almost verbatim on June 6, 1985. Sup. Ct. Order No. 84-303, June 6, 1985. Each state adopting the Rules interprets them according to standard interpretation practices, but in the context of local practice culture. In Montana, the State Bar Ethics Committee provides advisory interpretations of the Rules to lawyers and proposes amendments to the Montana Supreme Court, which has ultimate authority over the content of the Rules and their interpretation. The Model Rules of Professional Conduct provide minimum standards, and are enforced by the Commission on Practice of the Montana Supreme Court.

51. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983).

52. *Id.* at R. 5.4(d).

53. The Commission recommended that all rules of professional conduct applying to a lawyer practicing in law firm should also apply to an MDP. See Reporter's Notes, *supra* note 49. In terms of assuring that an MDP will comply with existing ethical standards, the Commission suggested a system of annual certification and audit provisions. In its annual certification, an MDP must acknowledge that "[i]t will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice." See MDP Commission Recommendation, *supra* note 16. Supporters of these safeguards suggest that the "certification and audit provisions perform an educative function, reminding both the lawyers and nonlawyer principals in an MDP of the importance of those values and the need to be vigilant in establishing practices and procedures to protect them. See Daly, *supra* note 32, at 279.

54. See MDP Commission Recommendation, *supra* note 16. The Commission's recommendation suggests that the current version of Rule 5.4 be amended to read:

Lawyers should be permitted to share fees and join with nonlawyer professional in a practice that delivers both legal and nonlegal professional

Proponents, in favor of allowing fee sharing arrangements, note that in terms of the professional independence of lawyers, there are many current settings in which lawyers work for nonlawyer employers. Those arrangements include lawyers working as in-house counsel in corporate law departments and government agencies, as well as lawyers representing individual clients while employed by nonprofit legal services organizations and prepaid legal insurance plans.<sup>55</sup> Professor Robert Gordon summarized the proponents position in his comments to the MDP Commission in the following manner:

Any and all forms of professional practice are subject to pressures, constraints and temptations – pressures from hierarchical superiors or peers, payment systems or fee arrangements, incentives to career advancement or financial reward inside firms or in the profession generally – that may to a greater or lesser extent compromise the exercise of a lawyer's independent judgment. Over the course of this century, the legal profession has adopted many arrangement and organizational forms for representing clients and receiving payment for services that pose conflicts between their own interests on the one hand and the interests of clients and the public good on the other. Hourly billing, to take one of many examples, tempts some lawyers to run the meter, churn cases, and pad bills; contingent fees, to take another, tempts others to shirk on effort, and settle early and low. Such conflicts are unavoidable: No set of arrangements has ever been or ever will be devised that will entirely remove such pressures and temptations. The question [the] Commission has to ask is, "Do the proposed arrangements for lawyers to practice with non-lawyers promise to add any significant sources of pressure, constraint and temptation to those that already exist?"<sup>56</sup>

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services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. "Nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.

*Id.* at Recommendation 1.

55. Jones & Manning, *supra* note 44, at 1197. Critics have suggested that "by arbitrarily permitting certain types of affiliations between lawyers and nonlawyers while condemning others, the current Rule 5.4 creates the strong impression that its primary purpose is not the preservation of independent judgment but rather the selfish protection of lawyers' economic interests." *Id.* at 1205. The Kutak Commission specifically criticized the ban on fee splitting as "only tenuously related to substantial ethical concerns [about lawyer-nonlawyer] relationships," denounced it as "economic protectionism" for traditional legal service organizations and condemned it for "imped[ing] development of new methods of providing legal services." Daly, *supra* note 32, at 242.

56. Letter from Robert W. Gordon, Fred A. Johnston Professor of Law at Yale Law School, to the Commission on Multidisciplinary Practice (May 21, 1999), at <http://www.abanet.org/cpr/gordon.html>.

Ultimately, proponents suggest, the consequence of the current rule has been to create a situation in which thousands of lawyers now work in consulting firms, investment banking houses, accounting firms, and elsewhere, applying their skills and offering advice to clients completely outside the structure of the legal profession and outside the reach of the rules of ethics.<sup>57</sup>

On the other hand, opponents of the Commission's recommendations argue that anything tending to undermine lawyer independence is a threat to the entire system of justice, because that system depends to such a high degree upon voluntary compliance with an independent lawyer who has an ethical duty to uphold the law.<sup>58</sup> A lawyer must have undivided loyalty to his or her client, and must be free from outside influences. By allowing nonlawyers to have direction or control over a lawyer, the lawyer's clients become subject to the economic influences of members of professions that do not share the core values of the legal profession.<sup>59</sup> In addition, opponents contend that all of the benefits of engaging multiple disciplines in providing legal services can be obtained without the need to jeopardize the core values of the legal profession.<sup>60</sup> Lawyers can, and do, currently specialize in particular areas of the law, and retain or associate with accountants, engineers or other professionals to provide a multidisciplinary approach to problem solving.<sup>61</sup>

In short, opponents argue that MDP supporters have failed to explain why "business conditions" should dictate the elimination of ethical rules designed to protect clients by minimizing conflicts of interest. It should be the other way around, they suggest; legal ethics rules are designed to limit the business side of law so that it remains predominantly a profession dedicated to the public interest.<sup>62</sup>

### *1. Maintaining Confidentiality of Information in an MDP*

Also implicated in the MDP debate is Rule 1.6 regarding confidentiality of information. Rule 1.6 provides that a lawyer

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57. Jones & Manning, *supra* note 44, at 1205.

58. See Report to the Board of Governors, *supra* note 27.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

shall not reveal information relating to representation of a client unless the client consents after consultation.<sup>63</sup> The accompanying Comments to Rule 1.6 assert that confidentiality “facilitates the full development of facts essential to proper representation of the client” and “encourages people to seek early assistance.”<sup>64</sup>

In a traditional law firm setting, the law assumes that absent client direction to the contrary, one lawyer in the firm may share information with other lawyers and nonlawyers in the law firm.<sup>65</sup> However, opponents of the MDP format argue that there is no comparable duty of confidentiality in other professions. This lack of a duty would therefore compromise the relationship of trust necessary to promote full disclosure and

63. The full text of Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROF'L CONDUCT, R. 1.6 (1983). Rule 1.6 defined confidentiality much more broadly than had the predecessor Model Code and avoided the terms “secrets” and “confidences.” See Legislative History, *supra* note 46, at 51.

64. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (1983). The Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981) stated that:

[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

*Id.* at 389. For a discussion on the origins and historical developments of the rule of confidentiality see generally James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279 (1963); Geoffrey C. Hazard Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978).

65. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 cmt. g (1996). The duty to maintain confidentiality also extends to nonlawyer assistants and employees of the lawyer. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 88-1525 (1988); see also *Pennsylvania v. Mrozek*, 657 A.2d 997 (Pa. 1995); *Ohio v. McDermott*, 651 N.E.2d 985 (Ohio 1995). It is the lawyer who must oversee nonlawyer employees to ensure confidentiality or be subject to discipline for any disclosure of information. See Accord Me. Bd. of Overseers to the Bar, Professional Ethics Comm'n, Op. 134 (Jan. 21, 1993).



complete development of the facts.<sup>66</sup>

An example close to the heart of the accounting profession involves the traditional audit function. The public expects that the auditor is under a duty to disclose problems and discrepancies discovered in the audit with no duty of confidentiality to the client. Lawyers, on the other hand, are perceived by the public to be under a duty not to disclose problems or matters harmful to the client.<sup>67</sup>

Consider the example of Arthur Andersen's involvement with the energy giant Enron. Former Chairman of the Commission on Multidisciplinary Practice, Sherwin P. Simmons, recently stated that Enron "emphasizes the importance of separating the consulting [including legal] from the audit function."<sup>68</sup> Simmons predicted that the Enron crisis will add a new sense of urgency to the MDP debate by asserting that "[a]ny state which changes its rules to permit MDPs will certainly want to take another look at the provisions permitting the structuring of legal services with audit services, which is a real, major problem."<sup>69</sup> Illustratively, since the Enron scandal many of Andersen's clients have left the accounting giant feeling unable to trust its independent advice.<sup>70</sup>

The Commission, however, is persuaded that confidentiality of client information can be maintained in an MDP. The Committee's recommendations in this area call for lawyers to be diligent in alerting a client to the difference between protected communications with a lawyer and potentially unprotected communications with a nonlawyer.<sup>71</sup> Moreover, the Commission

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66. Stein, *supra* note 8, at 1533. For example, if a lawyer working in an MDP receives information from a client, the lawyer is duty bound not to disclose that information without the client's permission. However, if a social service professional, working in that same MDP, learns from a client of the abuse of a child, that professional has an obligation to disclose this information to government authorities.

67. *Id.* The Commission recognizes that inconsistencies exist with regard to this particular disclosure function. See MDP Commission Report, *supra* note 16. Additionally, even when the accountant is not performing "audit" functions, or does not have an affirmative obligation of disclosure, his knowledge about the client's affairs is discoverable. See Alabama State Bar's MDP Task Force, Proposed Report to the Board of Bar Commissioners of the Alabama State Bar by the Multidisciplinary Practice Task Force, Con Subcommittee (June 2000), available at <http://www.alabar.org/page.cfm?view=74&DocID=805>.

68. Geanne Rosenberg, *The Enron Implosion: Scandal Seen As Blow To Outlook For MDP*, NAT'L L. J., Jan. 21, 2002, at A1.

69. *Id.*

70. See e.g., Janice Revell, *Fight And Flight At Andersen*, FORTUNE, Apr. 1, 2002, at 29, 30.

71. See MDP Commission Report, *supra* note 16. To address concerns related to

believes that "careful instruction about the obligation of confidentiality by a lawyer in an MDP to nonlawyers who are assisting the lawyer in the delivery of legal services will adequately protect the interests of clients."<sup>72</sup> MDP proponents suggest that this careful policy of disclosure is adequate to protect a client's expectations of confidentiality.<sup>73</sup>

## 2. *Protecting Against Conflicts of Interest in an MDP*

The safeguards to conflicts of interest also come into question under the MDP proposal. Under the Rules of Professional Conduct, Rule 1.7 requires that an attorney not have a conflict of interest with regard to the client, unless the client consents to the conflict after consultation.<sup>74</sup> This duty of loyalty is an essential element in the lawyer's relationship to a client,<sup>75</sup> and can be impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or

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the protection of confidential client information, the Commission suggests that:

[l]anguage [should] be included in the Comment to the amended Model Rule 5.4 emphasizing the need for a lawyer in an MDP to take measures to clarify the lawyer's position within the MDP, the lawyer's relationship with the MDP's clients, and the obligation of the MDP to protect client and public interests. The measure should include informing clients concerning the lawyer's function as a provider of legal services and the likelihood that the client's communications with nonlawyers in the MDP that are unrelated to the provision of legal services would not be protected by the attorney-client privilege.

*Id.*

72. See Reporter's Notes, *supra* note 49.

73. Stein, *supra* note 8, at 1543.

74. The full text of Rule 1.7 provides that:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7 (1983).

75. *Id.* at cmt. 1.

interests.<sup>76</sup>

The Committee's recommendation in this area maintains the status quo by providing that "all clients of an MDP should be treated as the lawyer's clients for purposes of conflict of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers."<sup>77</sup> In addition, the Committee recommends that an MDP be governed by the same Model Rules of Professional Conduct as a law firm with regard to the imputation of conflicts and permissible screening measures.<sup>78</sup>

Opponents, however, argue that the duty of loyalty cannot be discharged adequately if an attorney is an employee of a firm controlled by nonlawyers and that firm is not required to abide by the same rules regarding conflict of interest as the legal profession.<sup>79</sup> At its core, this issue is also about the independent professional judgment of a lawyer. Conflict of interest interferes with the lawyer's independent professional judgment in considering alternatives, and forecloses courses of action that reasonably should be pursued on behalf of the client.<sup>80</sup>

### *B. Protecting The Public From Unqualified Counsel*

From a historical perspective, the prohibitions against fee sharing are inextricably linked with the adoption and enforcement of unauthorized practice of law legislation in the United States.<sup>81</sup> Understanding this history is imperative to appreciating the present state of UPL enforcement in the United States and Montana.

By the early years of the twentieth century the concerns of the organized bar had turned "to ward off incursion by title insurance companies, credit and collection agencies, banks and trust companies, accountants, automobile clubs, mortgage and insurance companies, and lay representatives seeking to appear before administrative agencies."<sup>82</sup> With the expressed rationale

76. *Id.* at cmt. 4.

77. See MDP Commission Report, *supra* note 16.

78. *Id.*

79. Stein, *supra* note 8, at 1532.

80. MODEL RULES OF PROF'L CONDUCT R.1.7 cmt. 4 (1983).

81. Reporter's Notes, *supra* note 49.

82. RICHARD L. ABEL, AMERICAN LAWYERS 112 (1989). It is interesting to note that the rhetoric emanating from the courts during this time period sounds conspicuously familiar to the current MDP debate. For example, a New York court, fearful of corporate aggression into the practice of law, stated that:

being that the public will be harmed by untrained and unqualified individuals providing “legal” services,<sup>83</sup> local and regional bar associations employed a number of methods in seeking to stop lay competitors from “practicing law.” In some cases, bar regulators sought legislation to define the lawyer’s monopoly as broadly as possible.<sup>84</sup> This happened with greater occurrence during the Great Depression as the legal profession sought exclusive rights to income-producing work.<sup>85</sup>

In other instances, bar associations negotiated agreements with competing occupations that divided contested markets.<sup>86</sup> Beginning in 1937, the ABA and various state and local bar associations entered into formal “Statements of Principles” with competing professions, including accountants, architects, bankers, claims adjusters, collection agents, engineers, social workers, law book publishers, realtors, and insurance brokers.<sup>87</sup> Each year 10 to 20 representatives of the bar and the businesses involved met to amend their agreements and consider complaints of violations.<sup>88</sup> By maintaining these agreements, bar associations hoped to “ensure better public relations for all concerned,” as well as increase efficiency in “serving the public.”<sup>89</sup> Ultimately, however, pressure from the Justice Department’s Antitrust Division prompted many bar

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The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law. The corporation might not have a lawyer among its stockholders, directors, or officers. Its members might be without character, learning or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state.

*In re Coop. Law Co.*, 92 N.E. 15, 16 (N.Y. 1910).

83. See generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 829 (1986).

84. Jones & Manning, *supra* note 44, at 1171.

85. *Id.*

86. *Id.*

87. Deborah L. Rhode, *Policing The Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 9 (1981).

88. *Id.*

89. *Id.*

associations to rescind their formal statements of principles.<sup>90</sup>

During this same time period, the bar also embarked on an aggressive effort to prosecute lay competitors for the unauthorized practice of law.<sup>91</sup> In 1914 the New York County Lawyers Association appointed the first committee on unauthorized practice, which soon brought a series of cases against corporations, including title and trust companies.<sup>92</sup> Following New York's lead, the ABA established its first Committee on Unauthorized Practice in 1930; and by 1938 over 400 state and local bar associations had established similar committees, with educational, investigative, and enforcement responsibilities.<sup>93</sup> Over the years, bar associations have typically been concerned with corporations and laymen attempting to practice law without a license. Examples of these attempts include: real estate brokers who draw up documents in property transfers; individuals or organizations selling do-it-yourself kits; and lay involvement in insurance, debt collection, bankruptcy, immigration, and trust or probate matters.<sup>94</sup>

However, UPL enforcement proved to be terribly difficult due to the seeming impossibility of defining what constitutes the "practice of law."<sup>95</sup> The position of both the 1969 Code and the 1983 Model Rules is that no uniform definition is desirable, and that each jurisdiction is free to determine its own limits.<sup>96</sup> Definitional ambiguity seemed to be a common problem among most American jurisdictions.

Montana has also encountered problems with UPL enforcement. In the 1980s, the Montana Supreme Court established the Commission on Unauthorized Practice to examine UPL claims. However, the Commission, which also suffered from an overly vague definition of the "practice of law,"<sup>97</sup> had no operating budget to investigate or prosecute

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90. *Id.* at 10.

91. Jones & Manning, *supra* note 44, at 1171.

92. Rhode, *supra* note 87, at 9.

93. *Id.* at 8.

94. *Id.* at 10.

95. Daly, *supra* note 32, at 250.

96. See MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 n.2 (1980); MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 1 (1983).

97. In Montana the "practice of law" is defined as:

Any person who shall hold himself out or advertise as an attorney or counselor at law or who shall appear in any court of record or before a judicial body, referee, commissioner, or other officer appointed to determine any question of law or fact by a court or who shall engage in the business and duties and

complaints,<sup>98</sup> and operated under a statute that contained relatively minor penalties for offenders.<sup>99</sup> During this time period, UPL enforcement proceeded in haphazard fashion, usually favoring sophisticated entities over individual laypersons. For example, while the Montana Supreme Court declared recurring lay representation in courts of limited jurisdiction to be unauthorized practice of law,<sup>100</sup> it found that a bank's preparation of deed of trust and mortgage instruments, not to be a violation of the statute.<sup>101</sup> In terms of a systematic approach to unauthorized practice, critics declared the law to be

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perform such acts, matters, and things as are usually done or performed by an attorney at law in the practice of his profession . . . shall be deemed practicing law.

MONT. CODE ANN. § 37-61-201 (2001). States adopting the MDP proposal may find it necessary to amend their statutory definition of what constitutes the "practice of law." Therefore, based on District of Columbia Court Rule 49, the Commission suggested the following definition in Appendix A of its Report:

"Practice of Law" means the provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

- (a) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents' estates, documents relating to business and corporate transactions, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;
- (b) Preparing or expressing legal opinion;
- (c) Appearing or acting as an attorney in any tribunal;
- (d) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;
- (e) Providing advice or counsel as to how any of the activities described in subparagraph (a) through (d) might be done, or whether they were done, in accordance with applicable law;
- (f) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (a) through (e) above.

Appendix A, *supra* note 37.

98. See Sally K. Hilander, *New Commission Opens The File On Unauthorized Practice*, MONT. LAW., Dec. 1998, at 1.

99. Hon. Douglas G. Harkin, *Letters To The Editor: Unauthorized Practice Casts Shadow On Legal Profession*, MONT. LAW., June 1997, at 10. The only remedy available for unauthorized practice was, and still is, in the form of an injunction from the court. If the injunction was ignored, the defendant could then be prosecuted under contempt of court. Mont. Code Ann. § 37-61-210 (2001).

100. Sparks v. Johnson, 252 Mont. 39, 42, 826 P.2d 928, 930 (1992).

101. Pulse v. N. Am. Land Title Co. of Mont., 218 Mont. 275, 282, 707 P.2d 1105, 1109-1110 (1985).

“unenforceable” and “without teeth.”<sup>102</sup> The Commission ultimately dissolved as the terms of its members expired.

Recognizing the need to address unauthorized practice in a more efficient and thorough manner, the Montana Supreme Court appointed a new Commission in the summer of 1998.<sup>103</sup> The new Commission began receiving about \$6,000 in annual operating expenses from the Montana Bar Association. However, the efforts of the new commission have also been seriously hampered by the same vague definition of the practice of law and relatively insufficient penalties for enforcement. Since its appointment, it too has largely failed to provide an organized and systematic regulatory approach to the unauthorized practice of law in Montana.

#### V. ANALYSIS: ABSTENTION, PROSECUTION OR REGULATION?

The Montana Bar Association is currently at a crossroads. After undertaking study of the MDP issue, the Association has three choices: do nothing, in which event external forces will become the sole determinants; enforce current regulations ( i.e. UPL statutes) to try and stop the MDP onslaught; or amend the current rules to allow for regulation of lawyers practicing in the MDP format (implicit in these options is the assumption that lawyers are already practicing in the MDP environment throughout the country, and will continue to do so unless otherwise stopped).

One option the Montana Bar Association has before it is to simply ignore the MDP phenomena. However, collectively putting our heads in the sand will not address the problem. At the heart of the MDP issue is the very real and immediate threat of a separate “caste” of lawyers operating in multidisciplinary environments outside the purview of existing ethical standards.<sup>104</sup> If regulators choose to ignore MDPs, lawyers operating in these environments will continue to ignore the ethical rules, which will “breed disrespect for the law and legal ethics rules, and it may create a race to the bottom” to gain a competitive advantage.<sup>105</sup> Continuing to ignore the MDP

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102. Sally K. Hilander, *Fake Lawyers: Unauthorized Practice Issue Is Coming To A Head*, MONT. LAW., May 1997, at 3, 6.

103. Harkin, *supra* note 99.

104. Laurel S. Terry, *A Primer On MDPs: Should The “No” Rule Become A New Rule?*, 72 TEMP. L. REV. 869, 920 (1999).

105. *Id.*

phenomena poses a harmful situation to the legal profession, the rules that regulate it, and the public at large.<sup>106</sup>

Another option for Montana would be to increase enforcement of UPL legislation in order to contain, and ultimately stop, the growth of MDPs. Critics of the MDP proposal suggest that should states adopt the practice model, nonlawyers would be “practicing law” at unprecedented rates,<sup>107</sup> exposing the public to the harms of unqualified, nonlawyer practitioners.<sup>108</sup> However, Professor Charles Wolfram has articulated that in order to be persuasive, the “public harm” rationale must demonstrate two core propositions.

First, it would be necessary to demonstrate that lawyers under an unauthorized practice system are on average significantly more protective of client interests than nonlawyer practitioners would be in the absence of unauthorized practice rules. Second, it is necessary to demonstrate that in fact potential clients would be worse off without unauthorized practice protection.<sup>109</sup>

Carrying this argument to the current debate, opponents of the MDP proposal are hard-pressed to submit evidence suggesting that a client would be better served by a lawyer than by a nonlawyer professional, in many MDP practice areas. Additionally, judges are not sympathetic to UPL claims when there is no evidence of client harm.<sup>110</sup> And regulation of any unauthorized practice that is not harming the public may be

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106. Additionally, consider the effect that MDPs might have on Montana's small and mid-sized law firms (which account for a vast majority of practitioners in the state). Even today, small and mid-sized firms are under pressure from larger statewide, regional or national firms, making it difficult for them to keep larger institutional clients. See Norman K. Clark, *Multidisciplinary Practice: What will it Mean for the Smaller Firm?*, WIS. LAW., Sept. 1999, at 20. MDPs will prove to be more formidable competitors, with their ability to cost-effectively address complex, multidisciplinary issues. Small and mid-sized firms should be allowed the opportunity to prepare themselves in like manner for this situation. *Id.* To do nothing about this possibility may prove fatal.

107. Reporter's Notes, *supra* note 49.

108. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 1 (1983).

109. WOLFRAM, *supra* note 83, at 829. Professor Wolfram provides the following example by stating:

In other words, even if one can safely assume that a purchaser of residential real estate is more competently represented by a graduate of a prestigious law school with years of experience and fee rates to match, one is still entitled to inquire whether the purchaser would be worse off if form documents used for a purchase agreement were filled out in the purchaser's behalf by a real estate agent with a high-school diploma who specializes in purchases of residential real estate and whose employer charges nothing extra for the document work.

*Id.*

110. Terry, *supra* note 104, at 921.



viewed as turf protection on behalf of the legal profession, leading to eventual action by the legislature.<sup>111</sup>

It is important to draw the distinction between accountants and other professionals assisting lawyers in the “practice of law,” and a nonlawyer who independently holds himself out to be a lawyer. Clearly, the latter possesses cause for concern.<sup>112</sup> Jim Hunt, Chair of the Montana Commission on Unauthorized Practice, has stated that attempting to bar entities whose services touch on the law would be a “practical morass and a political nightmare” and might not be necessary to protect the public.<sup>113</sup> The real problem is with the nonlawyer “who sets up shop in his garage and advertises that he does divorce work.”<sup>114</sup> These comments not only support the proposition that clients will not likely be harmed by other professionals, but they also give insight into how far regulators are willing, or able, to prosecute UPL legislation in Montana.

An additional problem with the enforcement of Montana’s UPL statute is the vague definition of what constitutes the “practice of law.” Montana’s current definition prohibits a nonlawyer from (a) holding out or advertising as an attorney, (b) appearing in a judicial proceeding, or (c) engaging in duties “usually done or performed by an attorney.”<sup>115</sup> However, rather than defining the “practice of law” in an inclusive sense, the definition attempts to exclude nonlawyers from performing the tasks of a lawyer, without enunciating what those tasks are. Consequently, even if regulators in Montana were motivated to stop UPL violations, pursuing individuals or corporations under this definition would be practically useless.

Therefore, if it is dangerous to ignore the MDP issue, and infeasible to try and stop its progression, the only other

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111. This scenario, of course, draws its own set of constitutional issues (separation of powers), which are well beyond the scope of this comment.

112. Consider the example of a Helena couple who pleaded guilty in 1997 to charges of posing as lawyers. The couple, who called their business the McCleod Law Firm, were alleged to have bilked numerous “clients” out of a total of about \$250,000. See Hilander, *supra* note 103, at 5.

113. Hilander, *supra* note 98, at 25. It is interesting to note that UPL enforcement against large accounting and consulting firms has proven to be unsuccessful. In one of the rare investigations of a Big Five accounting firm in recent years, the Texas unauthorized practice of law committee concluded, after an expensive eleven-month investigation, that it would not file a complaint against Arthur Andersen. And in 1999, the State of Virginia reached the same conclusion with respect to compliance law services offered by a professional services firm. See Stein, *supra* note 8, at 1535.

114. Hilander, *supra* note 98, at 25.

115. MONT. CODE ANN. § 37-61-201 (2001).

alternative, pragmatic as it may be, is to provide a regulatory structure to influence its direction. The Montana Bar Association and the Montana Supreme Court should amend Rule 5.4 of the Model Rules of Professional Conduct, to allow lawyers and nonlawyers to share fees for services. Regulation is not only in the best interest of the legal services consumer, but also the legal profession.<sup>116</sup>

It is the legal profession's duty to act in the public's interest. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of the self-interested concerns of the bar.<sup>117</sup> As evidenced by the increased use of pre-paid legal service plans, *pro se* representation, and now the demand for multidisciplinary practices, the American consumer is looking for new and more cost efficient ways to obtain legal services. Permitting the MDP format will allow consumers the choice of services they wish to receive, thus acting as a marketplace regulator. The Consumer Alliance submitted a statement to the ABA's MDP Commission, which provided:

In most products or services they buy, consumers want choices. Choice is the backbone of America's free enterprise, competitive business community. By allowing lawyers to partner with other types of professionals, every consumer could choose the method of service that best suits his or her needs. Not every consumer will want to consult a multidisciplinary practice that includes a lawyer - but all consumers would benefit from having that option and we believe that lawyers will benefit as well.<sup>118</sup>

Equally as important, acting to regulate MDPs will be in the best interest of the legal profession. By subjecting each individual lawyer to the same ethical rules, regardless of the practice setting in which the lawyer is employed, regulation will ensure the level of consistency and quality that has become the hallmark of the legal profession.<sup>119</sup>

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116. After hearing extensive testimony from lawyers and interest groups across the country the ABA's Multidisciplinary Practice Committee concluded that MDPs are not only in high demand by the consumer, but are in the best interest of the public. See Reporter's Notes, *supra* note 49.

117. MODEL RULES OF PROF'L CONDUCT, Preamble (1983).

118. The Consumer Alliance, Written Remarks to the MDP Commission, *available at* <http://www.abanet.org/cpr/multicom.html> (last visited May 2, 2002).

119. Melinda Merk & Patrick Schmidt, Written Remarks to the MDP Commission, *available at* <http://www.abanet.org/cpr/yld.html> (last visited May 2, 2002).

## VI. CONCLUSION

For centuries, the practice of law has been considered a “profession”. The word “profession” implies a commitment to preserve the public good. It is part of a lawyers job to “be directly concerned with the public good - with the integrity of the legal system, with the fairness of its rules and their administration, with the health and well-being of the community that the laws in part establish and in part aspire to create.”<sup>120</sup> To understand this calling is also to understand that one who practices law does so only within the larger theoretical framework of legal traditions, and the values that have formed them. To practice law is to “come into an activity with self-conscious historical depth, to feel that one is entering an activity that has long been under way, and whose fulfillment requires a collaboration among many generations.”<sup>121</sup> Considering this view, it is important to realize that the legal profession has evolved throughout its history to meet the changing needs of the public.<sup>122</sup>

Examples of such adaptation include the emergence of the corporate lawyer, the creation of modern law firms, the introduction of associates, the development of in-house corporate law departments, the expansion of key roles for lawyers in government service, the introduction of group legal services plans, the evolution of highly specialized practices, the recent explosive growth of the “mega-firms,” the creation of new categories of employees like paralegals to assist in the delivery of legal services, and the expansion of multidisciplinary approaches to client problems through the widespread use of nonlawyer experts and the establishment of ancillary businesses.<sup>123</sup>

It is, therefore, inevitable that the profession will continue to adapt and change as the “demands of society force the creation of new forms of practice and the evolution of new methods for delivering legal services.”<sup>124</sup> Today the profession again faces a challenge that promises to forever alter the landscape of legal service delivery. Multidisciplinary practice is an idea that has generated both enthusiastic support and fervent opposition. However, it is important to realize that MDPs are with us to stay, with or without the blessing of the

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120. DEBORAH L. RHODE, *ETHICS IN PRACTICE* 31-32 (2000).

121. *Id.* at 34.

122. Jones & Manning, *supra* note 44, at 1210.

123. *Id.*

124. *Id.*

bar. Whether one sees the MDP movement as the natural progression of a complex profession operating in an increasingly interdependent world, or a vicious attack on the regulatory backbone of an ordered society, it must be dealt with. Seemingly, the bar lacks the resources, political will, and statutory clarity necessary to increase UPL enforcement against nonlawyers whose professions brush against the practice of law. Recognizing this reality, the bar association has the opportunity to help shape the new legal frontier by working with, not against, the agents of change.

The regulation of MDPs will ensure that all lawyers, regardless of their practice setting, submit to the same ethical obligations and standards. By ensuring this uniformity, Montana's legal community will be fulfilling its commitment to protect the public interest, while simultaneously maintaining the integrity of its ethical heritage. MDPs may be the end of the world as we know it . . . and I feel fine.

